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No. 725

In the Supreme Court of the United States

OCTOBER TERM, 1959

POLICE JURY OF PLAQUEMINES PARISH AND NATIONAL SURETY CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 9-10) is reported at 272 F.2d 827.

JURISDICTION

The judgment of the Court of Appeals was entered December 28, 1959 (Pet. App. 11). The petition for a writ of certiorari was filed on February 23, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had jurisdiction, on motion of the United States, rather than by a separate action, to order forfeiture of a bond for nonpayment of condemnation awards and expenses.

STATUTES INVOLVED

Section 9 of the Rivers and Harbors Act of August 8, 1917, 40 Stat. 267, 33 U.S.C. 593, provides:

> Whenever any State, or any reclamation, flood control or drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress, for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of the Army may, in his discretion, cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of the Army: *Provided*, That all expenses of said proceedings and any award that may be made thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of the Army may require such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to execute

a proper bond in such amount as he may deem necessary before said proceedings are commenced.

Section 5 of the Rivers and Harbors Act of July 18, 1918, 40 Stat. 911, 33 U.S.C. 594, provides:

> Whenever the Secretary of the Army, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvement duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress: *Provided*, That certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. * * *

STATEMENT

The facts of the present controversy, as stated in the district court's findings and the documentary evidence before it, may be summarized as follows:

The United States and local agencies undertook construction of a canal known as the Alternate Waterway Connection with the Intracoastal Canal. In 1947, the Police Jury of Plaquemines Parish (hereinafter referred to as "the Police Jury") adopted a resolution that it would provide "without cost to the United States" all necessary lands, etc., needed for the project and would execute the proper conveyance "free of cost to the United States". A second resolution of 1951 recited the inability of the Police Jury to acquire the needed lands by purchase and requested condemnation by the United States, repeating the earlier statement that it would provide the necessary lands without cost to the United States.

These proceedings were accordingly instituted in 1952 and $100,000, furnished by the Police Jury, was deposited as estimated compensation. Among other things, the landowners moved for an additional deposit. Saying that the primary obligation was on the Police Jury, the court ordered a total deposit of $250,000 or security in that amount. To satisfy this requirement a performance bond of $150,000 was filed in 1953 with the National Surety Corporation as surety. The condition of the bond was that the Police Jury "will pay all awards and expenses of the condemnation proceeding". In 1958, the Police Jury furnished the United States a total of $122,620.75 resulting from confirmation by the court of awards made by commissioners under Rule 71A(h), F.R.Civ.P., or amounts of settlements. There remained owing $52,599.21, composed of $31,302.21, representing interest for delay in payment of the

difference between the total awards and the deposits, and $21,500, representing the fees of the Rule 71A (h) commissioners. Judgment was entered against the United States for $52,802.21.

The United States demanded payment of the balance owing, but this was refused by both the Police Jury and the surety. The United States moved that the surety and the Police Jury show cause why the bond should not be forfeited and the surety ordered to pay into court $52,599.21. Besides opposing the motion, the Police Jury filed a counterclaim. The answer of the surety, besides asserting defenses, asserted a cross-complaint against the Police Jury for indemnity including attorneys' fees, costs and expenses.

On December 2, 1958, the court granted the Government's motion, and that of the surety, for judgment over against the Police Jury. Appropriate judgments were entered on December 11, 1958. In connection with the denial of the motions for a new trial the court filed Findings of Fact and Conclusions of Law setting forth the grounds of its rulings, holding, *inter alia*, that the filing of the bond and the statute gave the court authority to proceed summarily against the Police Jury and the surety.

The Court of Appeals affirmed, its *per curiam* opinion stating (Pet. App. 10):

> The appellants would have had no further rights had there been an independent action. The proceedings by motion accorded every right and advantage to the surety and principal. No possible harm could have resulted. F.R.Civ.P. 61. We find no basis for any of the other objections raised.

ARGUMENT

The petitioners do not here urge any objection upon the merits of the claim, but merely the procedural issue of whether their liability could be enforced by motion in the condemnation case. As the Court of Appeals held, any procedural defect would result in no harm under those circumstances. The court had jurisdiction of the matter and the parties pursuant to the regularly instituted condemnation proceeding. Nothing was to be gained by instituting a new suit.

The procedure taken was, we submit, perfectly proper. While the Rivers and Harbors Act did not specifically refer to summary proceedings, the court is authorized to "make such order as shall be just in the premises and as shall adequately protect the respondents." To impose a purely technical requirement of a separate suit would be contrary to the broad authority given the court. And, as the district court said, the real beneficiaries of this statute are the landowners but, being many in number, it is highly desirable, if not essential, that liability be enforced upon motion of the United States.

This situation is little different from that involving an overpayment under the Declaration of Taking Act which may be recovered back by summary proceedings in the condemnation case even though the statute does not so provide. *United States* v. *Miller*, 317 U.S. 369, 381-382; *Garrow* v. *United States*, 1 F. 2d 724 (C.A. 5), certiorari denied, 318 765. Applicable here is the holding in the case (p. 382): "The respondents had full ity to

urge any meritorious reasons why judgment of restitution should not be entered against them. We think they were entitled to no more."

Without indicating wherein they are prejudiced, the petitioners argue that local procedure requires filing of a separate complaint (Pet. 5). The interpretation of the federal statute is, of course, a matter of federal law and federal condemnation proceedings, both as to substance and procedure, are governed by federal law. *United States* v. *93,970 Acres of Land*, 360 U.S. 328. There is thus no room for application of Louisiana law here.

The petitioners suggest (pp. 4-5) that liability on the bond should be enforced by the landowners, not the United States. Those landowners were, as the trial court said, the beneficiaries of the deposits, but since the full faith and credit of the United States are behind the proceeding it is the United States that is primarily concerned with adequate security. Plainly, the statute contemplated that, as in any other federal condemnation proceeding, the judgment should be paid by the United States and the judgment contained the statement that the United States "cause to be deposited" $52,802.21. The petitioners suggest no substantial reason why the procedure followed by the district court was not entirely appropriate under these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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